## ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF RHODE ISLAND.[2]

SUPREME COURT OF APPEALS OF WEST VIRGINIA.[3]

SUPREME COURT OF WISCONSIN.[4]

### ADMIRALTY.

*Vessel overtaking another—Rule* 22.—Rule 22 of § 4233 of the Revised Statutes of the United States, which directs that "every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel," applies until the overtaking vessel has completely passed the other: *Kennedy* v. *American Steamboat Co.*, 12 R. I.

### AGENT.

*Setting up Illegality of Contract—Estoppel.*—If A. obtains money from B. as for the purpose of paying it for B. to X., upon their agreement with X., and does not so pay it, but converts it to his own use, he cannot retain it as against B., on the ground that the contract with X. was illegal: *Kiewert* v. *Rindskopf*, 46 Wis.

### CONSTITUTIONAL LAW.

*Statute may be partly Void and partly Valid.*—Gen. Stat. R. I. cap. 79, prohibiting the sale and keeping for sale of intoxicating liquors, contains no exception in favor of importers whose imported liquors remain in the original packages, or of dealers holding outstanding licences: *Held*, that the chapter, although void as to such importers, was valid as to other persons, and if void as to license holders was valid as to others: *State* v. *Amery*, 12 R. I.

A law which is constitutional within certain limitations may, if it exceeds those limitations, be valid within them and void only for the excess: *Id.*

### CONTRACT. See *Agent; Fraud; Specific Performance.*

*Rescission—Need not be by Express Agreement.*—The rescission of a contract does not always require the *express agreement* of both parties; but where the contract is executory on both sides, upon *non-performance* by one party, the other may declare it rescinded. So *held* in the case of a building contract, where the alleged non-performance on plaintiff's part consisted in a failure to make payments as they fell due by its terms during the progress of the building: *School District* v. *Hayne*, 46 Wis.

### CRIMINAL LAW.

*Record—Notes of Evidence.*—The minutes of the evidence in crim-

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[2] From Arnold Green, Esq., Reporter; to appear in 12 R. I. Reports.

[3] From Hon. Robert White, Reporter, to appear in 14 W. Va. Reports.

[4] From Hon. O. M. Conover, Reporter, to appear in 46 Wis. Reports.

inal actions, though required by the statute to be kept by the judge and filed with the clerk, are no part of the record proper, and can be brought to the Supreme Court on a writ of error, only by bill of exceptions; and where the bill of exceptions merely shows that no such minutes were kept nor exceptions taken on the trial noted by the judge, and does not show that his failure in that respect *was excepted to*, it shows no ground for reversal: *Allen* v. *The State*, 46 Wis.

EJECTMENT. See *Possession.*

ELECTION LAW.

*Election Canvassers—Functions are Judicial.*—Boards of canvassers sitting to correct voting lists, exercise judicial functions: *Keenan* v. *Cook*, 12 R. I.

*Query*, whether they are liable in a civil action, for striking a name from the voting list or for refusing to place a name on it: *Id.*

But if they are so liable: *Held*, that they are to judge of the proof prescribed by Gen. Stat. R. I. chap. 7, § 14, and that in the absence of evidence showing that they struck a name from the voting list without proof of disqualification, which was satisfactory to them, judgment must be given in their favor: *Id.*

In an action against them for refusing to place a name on the voting lists: *Held*, that in the absence of evidence showing that they decided dishonestly or with a wilful purpose to deprive the plaintiff of his rights, although their decision was precipitate and erroneous, judgment must be given in their favor: *Id.*

EQUITY. See *Jurisdiction; Specific Performance.*

*Practice—Trust.*—On a testamentary trustee's bill for instructions: *Held*, that the court would only instruct the trustee in regard to circumstances actually existing or tolerably certain to arise in the course of his trust management: *Goddard* v. *Brown*, 12 R. I.

*Held, further*, that the court would not decide whether an interest was vested or contingent in a case where the question could only become important to the trustee by the death of a living *cestui*: *Id.*

*Practice—Cross-bill.*—Generally a cross-bill, *ex vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching matters in question in the original bill. It is generally proper when a cross-bill is filed against co-defendants to make the plaintiff in the original suit a defendant in the cross-bill: *West Va. O. & O. L. Co.* v. *Vinal*, 14 W. Va.

A cross-bill being generally considered as a defence to the original bill, or as a proceeding necessary to a complete determination of a matter already in litigation, the complainant is not, at least as against the complainant in the original bill, obliged to show any ground in equity to support the jurisdiction of the court. It is treated, in short, as a mere auxiliary suit or dependency upon the original; but when a cross-bill seeks not only discovery but relief, care should be taken that the relief prayed by cross-bill should be equitable relief: *Id.*

When the cross-bill not only sets up matters of defence to the original

bill, but prays the specific performance of a parol contract set up as a defence to the original bill in relation to realty, so far as it prays for affirmative relief upon said contract, it may be termed a cross-bill for relief in the nature of an original bill, and it is competent for the court to dismiss the original bill and afterwards treat and proceed with the cross-bill in such case as an original bill for relief: *Id.*

ESTOPPEL. See *Agent.*

EVIDENCE.

*Record—Parol Evidence.*—An officer's return on an execution is a part of the record of the case in which the execution issued: *Esten* v. *Cooke*, 12 R. I.

Parol evidence cannot be admitted to contradict the court record. Hence, in an action of debt on a judgment to which the defendant pleaded satisfaction, as appeared from the officer's return, in a larger sum than was admitted in the declaration: a replication, which set forth that part of the satisfaction pleaded arose from an illegal levy, the proceeds of which the plaintiff was compelled to refund, was held bad on demurrer, the record evidence of satisfaction being conclusive until modified by some proper proceeding operating directly on the record: *Id.*

FORMER ADJUDICATION. See *Stream.*

*Parol Evidence of what was decided.*—The judgment in a former suit between the same parties is conclusive of every issue decided in that suit, and in the second suit, it can be shown by parol evidence what was tried in the first, whenever it becomes necessary to do so: *Campbell* v. *Rankin*, S. C. U. S., Oct. Term 1878.

FRAUD.

*Rescission of Contract for.*—In an action to set aside a contract with defendant upon the ground that it was obtained by his false and fraudulent representations, plaintiff cannot recover if defendant believed the representations to be true, and plaintiff had equal opportunity with him of ascertaining their falsity, or had the means of ascertaining it by the exercise of reasonable diligence and was not prevented from doing so by any artifice of the defendant: *Mamlock* v. *Fairbanks*, 46 Wis.

HIGHWAY. See *Negligence.*

*Municipal Corporation—Overflow of Land on Highway—Change of Grade.*—No action lies against a municipal corporation for allowing the ordinary and natural flow of surface-water to escape from a highway on to adjacent land. Nor will an action lie for the results of such usual changes of grade as must be presumed to have been contemplated and paid for at the layout of the highway: *Wakefield* v. *Newell*, 12 R. I.

A municipal corporation has the same powers over its highways in respect to surface-water as an individual has over his land. *Inman* v. *Tripp*, 11 R. I. 520, explained and affirmed: *Id.*

HUSBAND AND WIFE.

*Separate Estate of Wife.*—The separate equitable estate of a married woman is subject to an equitable charge for her individual contracts in

favor of her creditors, and if a married woman declares expressly and in writing her intention to charge her separate equitable estate, or if she so declares verbally and her contract is for the benefit of herself or her separate estate, the charge will be valid: *Eliott* v. *Gower*, 12 R. I.

*Wife's Separate Estate—Her Power over it—Restraint on her Power of Alienation must be express—Liability for her Debts.*—A married woman, as to the property settled to her separate use, is to be regarded as a *feme sole*, and has a right to dispose of all her separate personal estate, and the rents and profits of her real estate accruing during the coverture, as if she were a *feme sole* unless her power of alienation is restrained by the instrument creating the estate: *Radford et al.* v. *Carwile et al.*, 13 W. Va.

Such restraint upon her power of alienation will not be implied from being authorized to dispose of the property in a specified manner. Such restraint must be either expressed, or so clearly indicated as to be equivalent to an express restraint: *Id.*

The liability of the separate estate of a married woman to the payment of all her debts incurred during coverture, is also an incident of the ownership of such separate estate; and it, too, can only be taken away by express words, or by an intent so clear as to be the equivalent of express words: *Id.*

But these incidents, liability to the payment of her debts and her *jus disponendi*, extend no further than to all her separate personal property and the rents and profits of her separate real estate accruing during the continuance of the coverture: *Id.*

The common law effectually protected the *corpus* of her real estate against her husband's control and against his debts. And her common-law disability to make any contract or incur any debt, during her coverture, which will in any manner affect or charge the *corpus* of her real estate, whether such real estate be separate property or not, is still in full force. The *corpus* of her real estate can only be affected or charged, by the vendor's lien when it has been reserved or by a conveyance or specific lien created by deed in which her husband has united with her and which she executed after privy examination: *Id.*

The debts of a married woman, for which her separate estate is liable, are such as arise out of any transaction out of which a debt would have arisen, if she were a *feme sole*, except that her separate estate is not bound by a bond or covenant based on no consideration, such bond or covenant being void at law, and she not being estopped from showing in a court of equity that it was based on no consideration: *Id.*

The consideration which will support an action for her debts or contracts, so as to make her separate estate liable, need not enure to her own benefit, or that of her separate estate, but it may enure to the benefit of her husband or any third party or may be a mere prejudice to the other contracting party; in short, it may be any consideration which would support the contract if she were a *feme sole: Id.*

But her separate estate cannot be made liable for the payment of any debt of her husband or of any other person, unless she has agreed to pay the same by some contract in writing, signed by her or by some one authorized by her: *Id.*

## JURISDICTION.

*Statutory Remedies.*—Whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes or acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the federal courts, must be determined by the essential character of the case, and unless it comes within some of the recognised heads of equitable jurisdiction, it must be held to belong to the other: *Van Norden* v. *Morton*, S. C. U. S. Oct. Term 1878.

## JURY.

*Objection to Juror—Rights of Jurors not to Criminate themselves.*—Though an objection to a juror, as legally disqualified, be improperly overruled, the error is cured if it appear affirmatively that he was not on the jury when the case was tried, and it does not appear that the party's right of peremptory challenge was abridged in getting him off: *Burt* v. *Panjaud*, S. C. U. S., Oct. Term 1878.

A man offered as a juror is, no more than a witness, compelled to disclose under oath his guilt of a crime which would disqualify him. The party relying upon such disqualification must prove it by other evidence if the juror declines to answer: *Id.*

## MINES. See *Trespass.*

*Act of* 1866—*Ditches and Canals over Public Land.*—The ninth section of the Act of Congress of July 26th 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," only confirms to the owners of water-rights and of ditches and canals, on the public lands of the United States, the same rights which they held under the local customs, laws and decisions of the courts, prior to its passage; and confers no additional rights upon the owners of ditches, subsequently constructed: *Jennison, Executor of Titcomb*, v. *Kirk*, S. C. U. S., Oct. Term 1878.

The origin and general character of the customary law of miners stated and explained: *Id.*

By that law the owner of a mining claim and the owner of a water-right in California hold their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed: *Id.*

By that law a person cannot construct a ditch to convey water across the mining claim of another, taken up and worked according to that law before the right of way was acquired by the ditch-owner, so as to prevent the further working of the claim in the usual manner in which such claims are worked, nor so as to cut off the use of water previously appropriated by the miner for working the claim, or for other beneficial purposes: *Id.*

## MORTGAGE.

*All Conveyances as Security for Money Lent—Parol Evidence.*—It is the established doctrine, that a conveyance made as security for a loan of money whatever may be its form, will be treated by equity as a mort-

gage, and that parol evidence will be admitted to show that a deed absolute on its face was intended as such a security: *Butler* v. *Butler*, 46 Wis.

*Personal Property to be subsequently Acquired.*—In Rhode Island, a mortgage of personal property to be subsequently acquired, creates a lien on such property when acquired, which is valid in equity against the mortgagor or his voluntary assignee; *Williams* v. *Winsor*, 12 R. I.

The question whether a mortgage, which allows the mortgagor to retain possession of the mortgaged personalty or to sell and replace the same, is fraudulent as against his creditors, should be determined by a jury from the circumstances attending its execution: *Id.*

### Municipal Corporation. See *Highway.*

*Liability for Acts of Officers.*—The City Council of Providence directed the highway commissioners to cut down a certain street to grade provided the adjoining owners agreed not to make any claim for damages. By inadvertence the cutting was done without the specified agreement on the part of one owner. In an action for damages brought by this owner against the city: *Held*, that the city was not liable: *Donnelly* v. *Tripp*, 12 R. I.

A municipal corporation is not liable for the acts of its officers though done under color of authority, unless such acts were authorized or ratified or done in good faith, pursuant to some general authority given: *Id.*

### Negligence.

*Bailee for Hire—Presumption—Evidence.*—Although where defendant's negligence is an essential element in plaintiff's cause of action, the burden is on plaintiff of proving such negligence, yet where plaintiff showed that his goods were injured while in possession of defendant as a bailee for hire, and that defendant when applied to by him, gave no account of the injury except merely that it occurred while defendant's agents were performing an act, which when performed with due care, does not ordinarily cause such an injury: *Held*, that this was evidence from which the jury might infer negligence: *Kirst* v. *Milwaukee, Lake Shore and Western Railway Co.*, 46 Wis.

### Nuisance.

*Flowage—Interference with Highways*—In equity proceedings the question at issue between the complainant and the respondent resolved itself upon the proof into whether the complainant was entitled to equitable relief for the inundation of his land and of a private pass-way, connecting his land with a highway, which was caused by a dam built by the respondent, and also whether the complainant was entitled to equitable relief for the interruption thus caused to his access to the highway. It appearing that a new and more convenient highway than the old one had been laid out over and along the dam, and also that the slope of the dam covered part of the old highway and also that the location of the old highway had never been legally changed by the town authorities. *Held*, that the dam was a nuisance in law but not in fact; *Held, further*, that as the public received no detriment, the complainant could only have relief for his individual injury; *Held, further*, that the com-

plainant was entitled to relief for the inundation; *Held, further*, that the complainant would be sufficiently relieved by an enlargement of the water aperture of the dam. And it appearing that raising the grade of the private passway would give the complainant convenient access to the new highway: *Held*, that the interruption to the complainant's access to the highway was capable of pecuniary compensation and therefore remediable at law: *Held, further*, that the decree should be without prejudice to the complainant's legal remedy unless the parties preferred to have a master ascertain the complainant's damage: *Stone* v. *Peckham*, 12 R. I.

## Possession.

*Prima facie Evidence of Title.*—In an action of ejectment or trespass to land, actual possession, or receipt of rent by plaintiffs prior to eviction, is *prima facie* evidence of title, on which recovery can be had against a naked trespasser: *Burt* v. *Panjaud*, S. C. U. S., Oct. Term 1878.

*Title prima facie implies—Extent of actual Possession.*—Title draws after it possession of property not in adverse possession of another: *Moore* v. *Douglass*, 14 W. Va.

Actual possession of a part of a tract of land under a *bona fide* claim, and color of title to the whole, is possession of the whole, or so much thereof as is not in the adverse possession of others; *Id.*

And in such case the party in actual possession of such part has a sufficient possession of the residue of the tract to entitle him to the action of unlawful entry and detainer against a wrongdoer who enters upon such residue, who has not the right of entry thereon, but the owner of such residue, or those authorized under him, may lawfully enter upon such residue without force and hold the same: *Id.*

## Specific Performance

*Matter of Discretion—Parol Contract respecting Land—Part Performance.*—Generally when a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree specific performance of it, as it is for a court of law to give damages for a breach of it. But the court of equity may, under certain circumstances, refuse its aid and leave the parties to their legal remedies, or it may rescind the contract and place the parties in *stutu quo* by making compensation, &c.: *W. Va. O. & O. L. Co.* v. *Vinal*, 14 W. Va.

In the exercise of the equity branch of jurisprudence respecting the rescission and specific performance of contracts, the court is governed by that sound and reasonable discretion which governs itself as far as it may, by general rules and principles, but at the same time which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties: *Id.*

In the case of parol contracts for land, partly executed, it is generally the duty of the court to exert proper means to ascertain the terms of the contract, whenever it clearly appears that a contract did exist upon the faith of which one of the parties has expended his money, &c., and this in order to prevent a failure of justice: *Id.*

*Parol Contract about Land—Consideration.*—A parol agreement between father and son, that on condition the son will enter upon a certain tract of land and improve it, the father will make him a deed for same, and in pursuance and on faith of such agreement the son enters upon the land and occupies and improves it, is sustained by a sufficient consideration, and should be specifically performed: *Lorentz* v. *Lorentz*, 14 W. Va.

Such contracts before they can be performed, in a court of equity must be established by competent and satisfactory proof, which must be clear, definite and certain: *Id.*

STATUTE. See *Constitutional Law.*

*Construction of.*—In construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted: *Platt* v. *Union Pacific Railroad Co.*, S. C. U. S., Oct. Term 1878.

STREAM.

*Riparian Rights—Use of Water by Upper Owner—Former Judgment.*—In an action by a lower against an upper proprietor on a small running stream, where the wrong alleged was that defendant, by keeping a large number of hogs enclosed in a yard on his premises upon such stream, and so fouling the stream, had deprived plaintiff of his beneficial use of the water on his premises for culinary and other domestic purposes, the court charged the jury that each proprietor was entitled to the use and enjoyment of the stream in its natural flow, subject to its reasonable use by other proprietors, that each had an equal right to the use of the stream for the ordinary purposes of his house and farm, and for the purpose of watering his stock, even though such use might in some degree lessen the volume of the stream or affect the purity of the water; that the lower proprietor had no superior right in this regard over the upper, that if in its natural state, the stream was useful both for domestic uses and for watering stock, but the use for ordinary stock purposes was more valuable or beneficial for all the owners along the stream than the use for domestic purposes, then the less valuable must yield to the more valuable use; but that its reasonable use for all purposes should be preferred if possible; and that the jury must determine from all the facts, taking into account the size, nature and condition of the stream, whether defendant made a reasonable and proper use of it. *Held*, on defendant's appeal, that there was no error in the instructions. *Hazeltine, Adm'r*, v. *Case*, 46 Wis.

While an appeal by defendant from judgment of a justice's court in plaintiff's favor in this action (which was tried by the justice without a jury), was pending in the circuit court, plaintiff commenced a second action before the justice for damages accruing to him *after the date of this action*, from defendant's use of the water of the same stream so as to deprive plaintiff of his reasonable enjoyment thereof; his complaint containing averments very similar to those in this action, except as to time, and when the present action was tried, the second was pending in the circuit court on plaintiff's appeal from the justice's judgment upon a verdict in defendant's favor. *Held*, that the judgment last named was

not in any way conclusive as to the rights of the parties in this action: *Id.*

SUNDAY. See *Time.*

TIME.

*Computation of—Sunday.*—By the decree of a Probate Court commissioners were appointed on the insolvent estate of a decedent, and six months were allowed to creditors to prove their claims against the estate. The six months expired on Sunday. The commissioners held their last meeting on the following day: *Held*, that the acts of the commissioners were according to law: *Barnes* v. *Eddy*, 12 R. I.

*Held, further*, that the duty of the commissioners required them to sit on the last day of the six months: *Id.*

Whenever a given period is fixed within which an act must be done, Sundays which fall within the period make a part of it; but if the period closes on Sunday the act may be done on the following day: *Id.*

TRESPASS. See *Possession.*

*Possession as Evidence of Title—Mining Claims.*—Possession of land by a plaintiff in trespass *quare clausum fregit* is *prima facie* evidence of title, and is sufficient for a recovery against a mere trespasser: *Campbell* v. *Rankin*, S. C. U. S., Oct. Term 1878.

While the local record of a mining community is the best evidence of the rules and customs governing their mining interests, it is not the best or only evidence of priority or extent of actual possession; *Id.*

The Act of Congress of May 10th 1872, section 5, gives no greater effect to the record of such mining claims than is given to the registration laws of the states, and this has never been held to exclude proof of actual possession, and of its extent as *prima facie* evidence of title: *Id.*

TRUSTEE. See *Equity.*

VENDOR AND PURCHASER.

*Waiver of Lien.*—If a contract is made for the sale of land, and nothing be said in the contract about the vendor's lien being reserved, and bond and personal security be taken for the purchase-money, this alone will not amount to a waiver of the vendor's lien, but if it be shown by direct evidence or by the circumstances of the case, that the vendor relied only on the bond and personal security, the vendor's lien is waived, and he would be required to execute a deed without reserving the lien. Before the passage of the statute requiring an express reservation of this lien on the face of the deed, the execution of the deed and the taking of personal security, would amount to a waiver of the vendor's lien: *Warren* v. *Branch*, 14 W. Va.

WATERS AND WATERCOURSES. See *Highway; Mines; Nuisance; Stream.*